

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 March 2007

CASE NO.:2006-LDA-144

OWCP NO.: 02-136144

IN THE MATTER OF

A.K.,
Claimant

v.

L-3 COMMUNICATIONS-TITAN CORPORATION,
Employer

And

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORKSOURCE,
Carrier

APPEARANCES:

Francis X. Duda, Esq.
On behalf of Claimant

Michael Thomas, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, (2000) and its extension, the Defense Base Act, 42 U.S.C.

1651 *et seq.* (DBA) brought by A.K. (Claimant) against L-3 Communications-Titan Corporation (Employer) and Insurance Company of the State of Pennsylvania/AIG Work Source (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on November 28, 2006 in St. Louis, Missouri.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 41 exhibits which were admitted, including pictures of Claimant and his work environment in Iraq both before and after his injury (CX-1 to 7), vocational rehabilitation evaluation of Claimant (CX-8), drug testing and physical examination forms pre-injury (CX-9 to 19), various U. S. Army forms showing Claimant's exposure to sulfur smoke and follow up medical treatment (CX-20 to 23), medical records from Drs. Mitchell Botney, Peter Tuteur (CX-24 to 30), W-2s of Claimant (CX-31 to 33), actuary tables, letter of termination and health insurance exclusions (CX-34, 35 and 36), employment positions with Employer (CX-37), naturalization certificate and letters of recommendation (CX-39, 40) depositions of Drs. James England, Botney and Tuteur (CX-41, 42), and prescription drug records (CX-42).¹ Employer introduced 27 exhibits which were admitted including various DOL forms (EX-1 to 6), medical examinations of Claimant by Dr. Robert Bruce (EX-7, 8), surveillance videos (EX-9, 11), Claimant's pre- injury wage information (EX-12), vocational reports and labor market surveys (EX-12 to 16), curriculum vitae's of Dr. Bruce and Ms. Beverly Brooks (EX-17, 18), Employer's discovery requests and Claimant's responses (EX-19 to 25), and depositions of Claimant, Dr. Bruce and William Bishop. (EX-26-28).

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on July 1, 2003 while working as an employee of Employer (EX-1, 2).
2. Employer was advised of the injury on July 4, 2003.
3. Employer filed a Notice of Controversion on July 4, 2003. (EX-3).
4. Employer paid Claimant temporary total disability from September 24, 2004 to July 20, 2006 for 108 weeks at \$996.54 per week for a total of \$111,324.24. Employer also provided and paid Claimant medical benefits as a result of his July 1, 2003 injury. (EX-4).

¹ References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits-CX-____, p.____; Employer exhibits- EX-____, p.____; Administrative Law Judge exhibits- ALJX-____, p.____.

5. As a result of the July 1, 2003 injury Claimant sustained a permanent breathing impairment (reactive airway disease).

II. ISSUES

The following unresolved issues were presented by the parties: (EX-5, 6).

1. Extent of injury: Whether Claimant suffers from total or partial permanent disability.
2. Date of maximum medical improvement (MMI).
3. Average weekly wage.
4. Interest and Attorney fees.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 36 year old naturalized American citizen living in St. Louis, Missouri. Claimant has worked as a pasta maker, dishwasher, quality control person, hotel security officer, bartender and banquet captain. (Tr. 37-40). Claimant was born in Iraq, and is fluent in Arabic and Kurdish. (Tr. 41-44). Prior to his employment with Employer, Claimant enjoyed good health earning \$21,359 in 2001, \$24,277 in 2002; and \$9,154.00 in 2003. (Tr. 46, 47).

On May 16, 2003, Employer hired Claimant as a linguist/translator after he passed a series of language and physical examinations and assigned him to translate for the U.S. Army 101 Airborne Division in Northern Iraq. (Tr. 48-50, 56, 57; CX-9 to 18). Employer paid Claimant an annual base salary of \$120,000 including fringe benefits and bonuses. (Tr. 53). From May 16 through December, 2003, Claimant made \$49, 856.00. From January to May 7, 2004 when he returned to the U.S. from Iraq, Claimant made \$51,162.00. (Tr. 109; CX-31 to 33; EX-12).

On July 1, 2003, while working with the 205th battalion, Claimant was exposed to sulfur fumes while sleeping outside. Claimant began to cough, became short of breath and developed a burning sensation in his nose, throat, and lungs. (Tr. 62-65; EX-24, p. 21). Many soldiers experienced similar breathing problems and Claimant developed skin rashes. The sulfur fumes were so intense that they attacked and killed nearby vegetation within a few days. (CX-1 to 7). Claimant was treated and diagnosed with reactive airway disease. (Tr. 68; CX-21 to 23). Despite the treatment Claimant continued to experience severe chest pain and coughing and was

admitted to a military hospital in Mosul. (Tr. 69, EX-24 pp. 16, 17, 22, 25, 31). Claimant was prescribed and took Albuterol and Prednisone. (Tr. 70).

Claimant continued medical treatment while performing exemplary work in Iraq until approximately May 17, 2004 when forced to return to the U.S. for specialized pulmonary treatment due to frequent episodes of exasperation, cough, and despia which prevented him from accompanying troops on their missions. (Tr. 76-80, EX-26, pp. 83-87, CX-40). In St. Louis, Missouri, Claimant saw pulmonologist, Dr. Botney, on June 28, July 7, August 18, 2004; February 11, June 27, October 7, 2005; and September 7, 2006. Dr. Botney ordered lab, blood work, x-rays, CP scan, methacholine challenge test (MCT) and pulmonary function test and diagnosed reactive airway disease syndrome. (Tr. 4, CX-24-29). Dr. Botney stated that Claimant's breathing impairment was triggered by sulfur and recommended avoidance of noxious agents such as fumes and dust which could provoke or trigger severe bronchospasm. (Tr. 85). Dr. Botney opined that Claimant should be able to work in clean, office type environments as long as there was little to no risk of exposure to inhaled irritants even at low concentrations because such exposures had the potential for triggering a full-blown reaction similar to a severe asthma attack. (CX-30, p. 52).

Currently Claimant takes Advair (twice daily), Singular (at bedtime) Spiriva (once daily), Prednisone, Fluticasone, and Albuterol. (Tr. 86- 89; CX-42). Claimant testified that the MCT was positive and that Employer sent Claimant to Dr. Tuteur for additional testing. (Tr. 94). According to Claimant, Dr. Tuteur diagnosed reactive airway disease and stated the condition was permanent and unlikely to improve. (Tr. 95).² Further, Claimant should live and work

² On September 29, 2004, Dr. Tuteur issued a report which includes the following comment;

With reasonable medical certainty, [Claimant] has chemical (irritant) induced bronchial reactivity. This condition is permanent and is unlikely to improve. With appropriate therapy that includes inhaled corticosteroids and inhaled beta 2 agonists in conjunction with strict environmental control avoiding those triggers and irritants which initiate an exacerbation, his symptoms can be minimized. However, in order to achieve environmental control the workplace as well as the residential environment has to be modified so as to make it highly unlikely that he will be exposed to such triggers.

With respect to specific questions addressed in letter dated September 14, 2004, Claimant carries the diagnosis of chemically induced bronchial reactivity. He has essentially achieved maximum medical benefit, but still will develop bronchial reactivity when exposed to sufficient concentration of appropriate "triggers". This condition is directly related to and caused by his exposure to the material emanating from the sulfur mine following its attack and explosion.... he is disabled in the sense that it is medically contraindicated for him to work in any environment

under strict environmental controls avoiding irritants which initiate exasperation (Tr. 96). Irritants include gasoline fumes, Pinesol, household cleaning supplies, perfume. (Tr. 97). Claimant testified that he does not know the identity of all irritants but dust, heat and cold and humidity will trigger a reaction. (EX-26, pp. 44-47). When a breathing attack occurs, his chest becomes tight. Dry coughing ensues with spitting up of clear white fluids. (Tr. 98, 99). On occasion humidity will trigger an attack. The attacks are unpredictable. (Tr. 100).³

which even from time to time, may be associated with a condition that triggers the bronchial reactivity. He requires continued therapy indefinitely with beta 2 agonists and inhaled steroids as well as environmental control. The medical regimen, which he currently is taking, is appropriate. I would recommend, in addition, inhalation of nasal steroids to reduce symptoms of the upper respiratory tract. Also it is imperative that he maintain environmental control as indicated above. Though he has not lost respiratory function because of "remodeling," from time to time it is clear that his respiratory function worsens when exposure leads to an exacerbation. This condition is permanent. No surgery is necessary or indicated for this condition. Of importance is to recognize that he does have the physical ability to engage in a home based work environment. This is an environment which he can control. With his history of working as a translator, it may be appropriate to consider remunerative activity translating documents using computer technology in the home. (CX-29, pp 2, 3; CX-30, pp. 3, 4).

³ Employer also sent Claimant to specialist, Dr. Robert Bruce who saw Claimant on February 14, 2006 and July 12, 2006, and subsequently issued reports on June 20, 2006 and July 12, 2006. In his report of June 20, 2006, Dr. Bruce concluded that Claimant had developed reactive airway syndrome as a result of his exposure to fumes from a sulfur mine and that subsequently he received appropriate treatment with less recurrent symptoms. Further on June 24, 2004, Claimant had a MCT that was positive, but another MCT performed as part of Dr. Bruce's evaluation was normal as was his examination of Claimant. Dr. Bruce therefore concluded that Claimant's breathing impairment had resolved with treatment, and that Claimant was employable as long as he avoided exposure to things that triggered his reactive airways disease. Dr. Bruce recommended Claimant continue with his medications consisting of Advair, Spiriva, and Singulair because Claimant's symptoms had persisted. (EX-7) In his July 12, 2006 report, Dr. Bruce stated that although Claimant continued to experience respiratory symptoms from time to time his examination of February 12, 2006 was completely normal including the MCT results. Therefore Dr. Bruce concluded: (1) Claimant's reactive airways disease caused him to be only temporarily disabled; (2) Claimant has no permanent partial disability rating of his respiratory system as a result of his July 2003 exposure; (3) Claimant has reached maximum medical improvement by February 14, 2006; (4) Claimant's respiratory treatments should be gradually withdrawn; and (5) Claimant no longer has reactive airways disease as confirmed by a negative MCT (EX-8). Dr. Bruce's curriculum vitae appear at EX-19.

Employer terminated Claimant effective July 20, 2006. (Tr. 104). Employer continues to advertise new job openings in the U.S., but has not rehired Claimant although he is willing to relocate anywhere in the U.S. as long as Employer accommodates his restrictions. (Tr. 113; CX-37). While working for Employer Claimant received a series of commendation letters. (CX-40, Tr. 107).

On cross examination, Claimant admitted hanging and sanding a door with the help of a friend. (Tr. 115). He also admitted taking care of a one and six year old child at home with his wife, running occasional errands which includes picking up his daughter at school. (Tr. 116; EX-26, p. 80). Claimant spends most of his day inside the house watching TV or going on the internet. Claimant tried to cut his grass, but had a reaction and had to pay a friend \$20 to do it. (EX-26, p.81). On an average Claimant has 4 to 5 breathing attacks per month lasting several minutes up to one hour. (Tr. 123, 124). As a result of his breathing problems, Dr. Tuteur has recommended a job with a completely controlled environment such as the one at his home. (Tr. 125).

C. Testimony of Drs. Mitchell Botney, Peter G. Tuteur, and Robert Bruce

Dr. Botney, a board-certified pulmonary specialist, testified he first saw Claimant on June 24, 2004, during which he took Claimant's medical history including complaints of coughing, chest tightness and pain, and administered pulmonary functioning test which was normal with a positive MCT. (CX-41B, pp. 10, 29, 30). Based upon test results Dr. Botney diagnosed reactive airway disease, a pulmonary disease characterized by exposure to noxious inhalants followed by asthma like reaction in the airways. (Id. at 14, 15, 31). Dr Botney testified that Claimant's condition was aggravated by hot and humid conditions. (Id. at 16, 51). Further, subsequent testing on October 12, 2005 showed reduced lung volumes consistent with prior smoke exposure causing lung damage. (Id. at 18). Dr. Botney recommended avoidance of places where gases or fumes of any sort are present so as to avoid severe asthma like attacks. (Id. at 21, 25). Further Claimant's chances of being cured are exceedingly slight due to Claimant's failure to secure immediate and proper treatment. (Id. at 34).⁴

Dr. Tuteur, a pulmonary specialist, associate professor of medicine at Washington University School of medicine and medical director of the pulmonary function laboratory at Barnes-Jewish Hospital in St. Louis testified he first saw Claimant on September 29, 2004, during which he took a medical history from Claimant concerning his exposure to sulfur fumes followed by recurrent breathing problems (breathlessness, paroxysmal coughing and chest

⁴ In a June 28, 2004, report Dr. Botney noted that Claimant had an audible wheeze with poor air movement with labored breathing at minimal levels of methacholine and normal expiratory flows after treatment with inhaled albuterol. Dr. Botney noted that fumes and dusts were likely to trigger bronchospasm and should be avoided if at all possible with even mild exposure provoking severe reactions. In a report of July 7, 2004, Dr. Botney repeated the need for Claimant to avoid fumes and dust. In a September 1, 2004 report Dr. Botney stated that Claimant could perform any task in which ambient environment is fairly clean including all types of office work.

tightness) associated with exposure to dust, vehicular fumes, air pollution, cleaning material, cold and ambient temperatures. (CX-41c, pp. 10-13). On exam, Dr. Tuteur found erythema and inflammation of the nasal mucosa. Dr. Tuteur noted a prior MCT of June 24, 2004 which was positive and stated Claimant had reactive airways disease which was permanent and unlikely to improve with medication use to blunt the response to inhalation of irritant triggers. (Id. at 17-20, 42).

Dr. Tuteur testified that it was medically contraindicated for Claimant to work in any environment which even from time to time may be associated with conditions that trigger bronchial reactivity. (Id. at 23). Exposure to triggers can produce airway sickness for two or three days at a time. (Id. at 26). Further the work place and travel to and from the work place is not something Claimant can control. (Id. at 29). Dr. Tuteur testified that the February 14, 2006 MCT could not be interpreted because of a lack of diagnostic quality. (Id. at 31).

Dr. Bruce, a specialist in pulmonary medicine, testified that he examined Claimant on February 14, 2006 at Employer counsel's request. (EX-27, p. 8). Prior to the exam Dr. Bruce reviewed Claimant's medical record which included various reports from pulmonologist Drs. Botney and Tuteur. Claimant reported episodic breathing problems due to exposure to yellow fumes in Iraq on July 1, 2003. Claimant remained in Iraq until May, 2004. (Id. at 9, 10). Upon returning to the U.S. Claimant saw Dr. Botney who performed a MCT which was positive for reactive airway disease. (Id. at 11). Claimant had good and bad days with no respiratory symptoms to severe wheezing, chest tightness, shortness of breath, dry cough, choking and tightness in the throat. Triggers for those symptoms include his wife's perfume, Pine-Sol cleaner, other house hold cleaners, gasoline fumes, any strong smell, laughing, second hand smoke, upper respiratory tract infections, pollen, mold, sudden exposure to cold air, and exercise. Claimant is having fewer exacerbations while on medication. (Id. at 12).

Dr. Bruce performed a complete blood count, comprehensive metabolic panel, plasma chemistries, PA and lateral chest x-ray, chest CT, pulmonary function test and attempted a MCT. (Id. at 13). The only blood abnormality was a small red blood cell count. The CT showed indeterminate pulmonary nodules in both lungs measuring less than two millimeters. (Id. at 14). Dr. Bruce concluded that a prior MCT of June 24, 2004 was inconclusive with Claimant developing respiratory symptoms allegedly because the test was terminated after 1 milligram per milliliter dosage rather than 8 to 16 milligrams per milliliter with Claimant being given Albuterol. Claimant underwent a second Methacholine Challenge Test on February 14, 2006 which was terminated at .5 milligram per milliliter due to Claimant's coughing and insisting on using Albuterol. (Id. at 15-20). Dr. Bruce concluded Claimant had developed reactive airway syndrome (narrowed airways with chest tightness, sputum production, wheezing and shortness of breath) as a result of exposure to fumes in Iraq. (Id. at 21). General treatments consist of avoiding exposures to trigger symptoms, inhaled corticoid steroids. (Id. at 23). Symptoms last as long as the exposure lasts or until a broncodilator is administered and starts to work about 20 to 45 minutes. (Id. at 25, 43).

Dr. Bruce agreed with Dr. Botney that as long as Claimant avoided irritants he should do well in a clean office work environment. (Id. at 27, 28). Dr. Bruce disagreed with Dr. Botney's and Tuteur's finding of a June 24, 2004 MCT positive for reactive airway disease, but agreed on

stopping the test to avoid harm to Claimant. (Id. at 32, 33, 36). On the basis of Claimant records and history, however, Dr. Bruce agreed that Claimant had reactive airway disease. (Id. at 38).

D. Reports and Testimony of Vocational Experts James M. England, Jr. and Beverly G. Brooks

Mr. England, a vocational rehabilitation counselor, issued a report on June 24, 2005 evaluating Claimant's employability and wage earning potential. (CX-8). The report was based upon an interview of Claimant, plus a review of Claimant's medical file, family, social and educational background, vocational history and testing results. Considering all those factors especially Claimant's medical condition limiting him to indoor temperature controlled environments, Mr. England ruled out his past employment including that of translator finding little if any demand for such skill in the St. Louis area, plus no opportunity for homebound employment based upon Dr. Tuteur's restrictions.

Mr. England testified that he met with Claimant on January 18, 2005 during which he obtained Claimant's education, work experience, day to day functioning. Later Mr. England reviewed Ms. Brooks' March 8, 2005 report, along with medical assessment of Claimant's ability to work from Dr. Tuteur and Dr. Botney with the former limiting Claimant to work in a controlled environment such as his home with the latter limiting Claimant to essentially a temperature controlled clean air environment. (CX-41(A), p. 14).

Mr. England found Claimant unable to perform his past work due to the exposure to dust, temperature extremes, fumes, or cleaning solutions with the only possibility being that of a translator in a controlled environment. (Id. at 19, 20, 25). Mr. England relied upon test results obtained by Ms. Brooks's showing 6th grade math ability with Claimant able to read and understand manuals and perform basis paperwork. (Id. at 22). Based on either Dr. Tuteur or Dr. Botney's restrictions Mr. England testified Claimant would have difficulty working outside his home due to an inability to maintain air purity. (Id. at 26). Work as a translator in a clean-air environment paid about \$11.65 per hour or about \$35,100.00 annually. However, in the St. Louis area there was not much of a demand for Claimant's translation services with Claimant able to make no more than a few thousand dollars per year. (Id. at 27). Claimant could do customer service work recording orders on a computer at \$8.00 to \$9.00 per hour. However, this work would not be available if Dr. Tuteur's restrictions were applicable. (Tr. 28, 29).

Concerning the office translator position identified by Ms. Brooks on June 20, 2006 at National Geospatial-Intelligence Agency, Mr. England had no problem with Claimant performing that job if it could be performed in a clean air office atmosphere. Likewise Mr. England had no problem with home based job identified by Ms. Brooks if they were available. (Id. at 30). However, Mr. England's own search found none of these jobs available on an in home basis and even if available they would pay no more than several thousand annually. (Id. at 31).

Vocational consultant, Ms. Brooks issued a vocational evaluation on March 8, 2005 followed by labor market surveys on August 5, 2005, June 20, 2006, September 22, 2006, and

November 24, 2006, respectively after interviewing Claimant and considering his medical, social, vocational background and test results. Based upon those results Ms. Brooks in the August 5, 2005 report identified the following jobs which would accommodate Claimant's need for clean air environment:

(1) Webster University Department assistant (office job) paying \$10-\$15 per hour on a part time basis with duties including greeting visitors, answering inquiries, screening and routing incoming telephone calls, word processing, scheduling student recitals, preparing programs;

(2) Edward Jones sales recruiting representative (office job) paying \$45,000.00 to \$60,000.00 per year with duties of evaluating employment applications for investment representatives, selling candidates on Edward Jones and IR positions;

(3) Cover-all Inc., customer service representative (office job) paying \$8-\$11 per hour with duties including data entry, handling customer phone inquiries, entering purchase orders from clients, greeting customers, filing, record keeping;

(4) Arch Acquisitions marketing/public relations (office job) paying \$35,000 to \$45,000 per year with duties including training in public speaking, presentation, client interaction, data entry, customer service, record keeping;

(5) Verizon Wireless customer service representative (office job) paying \$10 per hour plus commissions with duties including responding to customer service calls, resolving billing and service equipment issues, providing product information;

(6) Town and Country assistant store manager (store job) paying \$30,000 to \$45,000 per year with duties including sales, customer service, training employees and maintaining department profitability through research;

(7) Silver Staffing Services customer service representative (office job) paying \$12 per hour with duties including answering incoming calls, handling customer problems and complaints;

(8) Ben & Jerry's Store Manager (store job) paying \$31,000 to \$35,000 per year with duties including all store operations of hiring, training, scheduling, pay preparation, inventory, management, and ordering;

(9) Office Team customer service representative (office job) paying \$11.40 per hour, 28 hours per week with duties including making calls to business owners and associates;

(10) Holiday Inn hotel catering coordinator (office job) paying \$23,000 to \$36,000 per year with duties including planning catered functions, working with sales personnel to generate new guest room business;

(11) Whelan Security guard paying \$8 to \$10 per hour with duties including patrolling building and grounds, insuring safety of employees and guests;

(12) Barnes Jewish Hospital cafeteria service food cashier paying \$8-\$10 per hour with duties of providing accurate, secure cash drawer while completing cash transactions;

(13) Office Depot customer service associate (store job) paying \$8.50 to \$12.00 per hour with duties including providing customers with merchandise information regarding assortment and location, and assisting with display presentation;

(14) Cedar Springs security guard paying \$7.40 per hour with duties including inspecting, monitoring, controlling, and patrolling areas; and

(15) Legal & Technical translator (at home job) paying \$35 to \$50 per hour interpreting by phone from Arabic to English with varying hours and schedule. (EX-14, p. 24).

(Ms. Brooks identified all of these positions as involving work in a clean environment where smoke, fumes from strong chemicals. Ms. Brooks alleged got these and other job examples off the internet but was unable to identify the internet sites used (EX-14, p. 13). In identifying suitable jobs Ms. Brooks used as Claimant's physical restrictions a clean ambient environment that would include all types of office work which were smoke free and free of strong chemicals. (Id. at 16-21). Ms. Brooks stated that Claimant would have to handle his exposure problems to perfume on a case by case basis. (Id. at 27).

On the June 20, 2006 labor market survey Ms. Brooks identified 10 translator positions Claimant could allegedly perform including:

(1) National Geospatial Intelligence Agency translator (office job in St. Louis) paying \$30,000.00 to \$50,000.00 per year

depending upon experience/schooling;⁵

- (2) Paragon Language Service translator working at home on an as needed basis paying \$.15 per word;
- (3) Uni Verse translator working at home on as needed basis at \$.14 per word;
- (4) Master Word Service translator working at home on as needed basis at \$.13 per word;
- (5) Basis Technology translator working at home on as needed basis at \$30 per hour;
- (6) Tele-Interpreters interpreter working at home on as needed basis at \$.50 per minute;
- (7) Translation Services translator a \$.10 to \$.13 per word working at home and at other locations on as needed basis;
- (8) Translated.Net translator working at home at \$25.38 to \$33.12 per page;
- (9) STG, Inc translator in Annapolis Junction, Maryland making \$70,000 to \$90,000 per year with Claimant probably making \$80,000 per year. (EX-29, p. 30-34).
- (10) Szanca Solutions Inc., translator in the U.S. State Dept. Embassy in Iraq, and at meetings in other locations making \$100,000 to \$160,000 per year. (EX-29, pp. 35-38; EX-15).

Ms. Brooks in a supplemental report of September 22, 2006, identified additional translator jobs at TCS Translations in Iraq paying \$180,000 per year and another translator position for Ambassador Passport and Visa Services for part-time work paying per word or page averaging \$40-\$60 per page. (EX-16, 17). Finally in a fourth labor market survey of November 24 2006, Ms. Brooks identified translator office jobs for Calnet Inc. in Fort Irwin, California paying \$120,000 per year; translator office positions for STG, Inc. at \$70,000-\$130,000 per year in Annapolis Junction, Maryland; translator office positions for Department of Homeland Security at various Immigration Service District offices in New York at \$80,954 per year; translator office jobs for the Department of the Army in Charlottesville, Virginia at \$74,074 to

⁵ Claimant applied for the translator position at National Geospatial –Intelligence Agency but was told when he informed them of his disability that it would take up to a year before he could get the job due to the fact he would have to have a top secret clearance. (EX-26, pp. 72-74).

\$96,292 and Arabic instructor positions for the Army in Monterey, California at \$25,195 to \$36,955; and translator position for Szanca Solutions at the U.S. State Dept. Embassy in Iraq, at \$100,000 to \$160,000 per year. (EX-29, p. 43, 45, 46).

Ms. Brooks testified that currently she does more longshore work and labor market research than in the past devoting 80% of her time to such work with emphasis the last year and one half on translator researched. (EX-29, p. 8). In January, 2005, Carrier gave her an assignment to evaluate Claimant. Ms. Brooks met with Claimant on January 26, 2005, obtained a vocational history, reviewed medical records and administered several vocational tests. (Id. at 10). Ms. Brooks found Claimant to have the following transferable skills: supervisory, scheduling, analyzing, problem solving, customer service, basic computers, translation from Arabic to English and English to Arabic, record keeping, report writing, shipping and receiving, fork lift, and cashiering. (Id. at 12).

Ms. Brooks identified the above named jobs using limitations imposed by Dr. Botney restricting Claimant to clean environment office work and the more restrictive assessment provided by Dr. Tuteur limiting Claimant to home based jobs preparing essentially four reports of August 5, 2005 (office type work), June 20, 2006 and September 2, 2006 (home based jobs), and November 24, 2006. Ms. Brooks admitted she had no way of telling which of these jobs Claimant would had gotten had he applied for them, but with good motivation he probably could have acquired some. (Id. at 22, 23). Of the translator positions, work with National Geospatial was full time and located in Annapolis Junction, Maryland. (Id. at 25).

When asked if Claimant could find employment working out of his home, Ms. Brooks testified that none of those jobs involved 40 hour work weeks with work hours determined by the work they received. (Id. at 48). However, Claimant could apply to more than one company at a time and work up to 9 hours per day. (Id. at 50, 51). If Claimant was aggressive in seeking out these positions he could stay quite busy achieving full time employment. (Id. at 52- 54).⁶ Ms. Brooks estimated that if Claimant worked for Ambassador which was listed on the September 22, 2006 report Claimant could earn up to \$5,000 per month. (Id. at 55). This estimate as well as other earnings estimates were admittedly Ms. Brooks' best guess and did not take into consideration that employers would have to make some reasonable accommodations for Claimant's condition. (Id. at 54-57, 72).

On cross, Ms. Brooks admitted Claimant had decreased job opportunities because of his physical limitations with Claimant unable to do mechanical work and outdoor physical type work. (Id. at 75, 76). Ms. Brooks estimated earnings potential of \$120,000 based on 52 forty hour weeks of work. (Id. at 86). Ms. Brooks admittedly never places any employees with asthma and could not recall any specifics on placing an employee who had similar impairments to Claimant. (Id. at 89, 94).

⁶ This estimate was based on Claimant working for 6 part time employers 52 weeks per year. (EX-29, pp. 61, 87).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends he is entitled to permanent total disability commencing July 20, 2003 with compensation paid at the maximum rate of \$996.54 based on Section 10 © of the Act using Claimant's average weekly wage as paid by Employer at time of injury of \$2,061.55. Employer argues that Claimant's average weekly wage should be based on Claimant's pre-injury earnings with Employer and Adam's Mark Hotel using: (1) an average of his earnings over a 3 year period prior to injury amounting to an AWW of \$495.90 (\$64,396.19 divided by 909 days); (2) wages earned from July 1, 2002 to June 30, 2003, (the 52 week period prior to injury), amounting to \$31,098.26 divided by 52=an AWW of \$598.04; or (3) wages earned by Claimant with employer in 2003 prior to injury of \$9,604.44 and dividing that sum by 46 work days x 7=an AWW of \$1,461.55. Employer recognizes that probable future earnings of Claimant can also be used in extraordinary circumstances where previous earnings do not realistically reflect wage earning potential, but argues against such an approach because during this time period he received raises and bonuses post-injury which were not present in either *Zimmerman v. Service Employers, Int. Inc.*, 39 BRBS 166 (ALJ, 2005) or *Patton v. Brown & Root Services*, 40 BRBS 32 (ALJ 2006).

Employer further contends Claimant reached maximum medical improvement on September 29, 2004, and since June 15, 2005, Claimant had a retained earning capacity which exceeds his average weekly wage based on labor market surveys of Ms. Brooks which show realistically available job opportunities Claimant could perform in St. Louis or worldwide within either a clean air office environment as recommended by Drs. Botney and Bruce, or the more restrictive home environment recommended by Dr. Tuteur.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case, I was impressed with Claimant's sincerity and candor and credit his testimony concerning his medical limitations due to his chemically induced reactive airway

disease. Despite spending most of his time at home Claimant continues to have 4 to 5 breathing attacks per month lasting several minutes to one hour. Claimant does not know the identity of all irritants which include gasoline fumes, Pinesol, household cleaning supplies, and perfume but has experienced breathing attacks when exposed to dust, heat and cold, and humidity.

Although Drs. Botney and Bruce would limit Claimant to working in clean office type environment, I find Dr. Tuteur's recommendation for Claimant to limit his work activities to a home environment to be the most reasonable restrictions because of Claimant's need to avoid irritants even at low concentrations which can cause severe full blown reactions similar to a severe asthma attack combined with an inability to control an office environment. Indeed, Dr. Tuteur noted that in order to achieve work place environmental control modifications had to implement making it highly unlikely Claimant would be exposed to substances that could trigger a reaction.

Concerning vocational experts England and Brooks, I credit Mr. England's reliance upon Dr. Tuteur's restrictions and his finding of no suitable alternative employment for Claimant. I was not impressed with Ms. Brooks' testimony about the ability of employers to accommodate Claimant's need for a clean air environment inasmuch as accommodations were never discussed with them. Rather, Ms. Brooks assumed a clean air environment if it was air conditioned and free of smoke. (Tr. 71-74). Ms. Brooks, moreover, had no experience placing any individual with asthma or asthma like conditions such as Claimant. Her estimates about income from in home translator jobs were also unimpressive based upon guesses about what Claimant could earn if "aggressive." Ms. Brooks never obtained factual data about actual earnings of in home translators and never apparently considered Claimant's loss of work time due to unprovoked breathing attacks. I was also not impressed with Ms. Brooks' inability to recall any internet services she used to obtain information about job openings.

C. Nature and Extent of Injury

Disability under the Act is defined as incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23

BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). In this case, I find in conformity with Dr. Tuteur's September 29, 2004 report that Claimant achieved maximum medical improvement as of that date.

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1038; *P&M Crane Co., v. Hayes*, 930 F.2d at 429-30; *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). In this case there is no question that Claimant cannot perform his past work whether reliance is placed upon the opinions of Drs. Botney or Tuteur. Even Employer acknowledged this fact as confirmed by Employer's termination and refusal to rehire Claimant.

Once a *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1038; *P&M Crane Co., v. Hayes*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992).

The Fifth Circuit has established a two-part inquiry to assist employers in satisfying their burden as to establishing available suitable alternative employment. The first inquiry states, "[c]onsidering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?" *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1042-1043 (footnotes omitted). The second inquiry requires a determination as to "[w]ithin this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure?" *Id. Meehan Seaway Service Co., v Director, OWCP*, 125 F.3d 1163 (8th Cir, 1997) *cert denied* 523 U.S. 1020 (1998); *D.M. & IR Railway Company v. Director, OWCP*, 151 F.3d 1120 (8th Cir. 1998).

Should an employer show reasonably attainable and available employment opportunities, the burden shifts to claimant to establish reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer. *Id.* A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d at 1040. A diligent job search “involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work.” *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ) (July 7, 1999). The claimant need not prove that he was turned down for the exact jobs that the employer showed as available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed as available. *Palombo v. Director, OWCP*, 937 F.2d at 74.

In this case, I credit Mr. England’s assessment about Claimant’s un-employability and discredit Ms. Brooks’ assessment of suitable alternative employment for the above stated reasons. Thus, I find, Claimant has established temporary total disability from May 14, 2004 when Claimant was forced to leave Iraq until September 29, 2004 when he reached MMI. From September 30, 2004 to present Claimant has been permanently and totally disabled.

D. Average Weekly Wage

Section 10(c) of the Act provides:

If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C § 910(c).

In this case neither Section 10 (a) or Section 10 (b) can be applied due to the dramatic change in the nature of the work to be performed (translator versus hotel employee), rate of compensation and number of days (7) worked per week. Thus I am required to use Section 10 (c). The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c). *Hayes v. P & M Crane Co.*, 23 BRBS 389 (1990); *Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981). It should also be stressed that the objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant’s wage-earning capacity at the time of injury. *Barber v. Tri-State Terminals, Inc.*, supra. In this case I find a fair and reasonable approximation of Claimant’s earning capacity to be based on the actual wages Claimant received while working for Employer in Iraq. See *Zimmerman v. Service Employers*

International 39 BRBS 166 (ALJ, March, 2005); *Patton v. Brown and Root Services*, 40 BRBS 32 (ALJ, January, 2006).

During Claimant's employment from May 16, 2003 through May 17, 2004 Claimant made a total of \$101,018 divided by 52= \$1,942.66. This results in a compensation rate of \$1,295.11. Since this amount exceeds the maximum allowable compensation rate established by Section 906 (b)(1), Claimant's rate of compensation is reduced to the maximum rate of \$996.54.

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961(1982). This rate is periodically changed to reflect the yield on United States Treasury Bills." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from May 17, 2004 to September 29, 2004, based on an average weekly wage of \$1,944.62, and a corresponding maximum weekly compensation rate of \$996.54.

2. Employer shall pay to Claimant permanent total disability pursuant to Section 908 (a) of the Act for the period from September 30, 2004, and continuing based on an average weekly wage of \$1,944.62, and a corresponding maximum weekly compensation rate of \$996.54.

3. Employer shall be entitled to a credit for all compensations paid to Claimant due to his July 1, 2003 breathing impairment.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge